UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. SHAUN R. HAYES and MICHAEL H. LITZ, Defendants.	))))))))))	No. 4:16 CR 157 AGF / DDN

REPORT AND RECOMMENDATION

This matter is before the Court upon the motion of defendant Michael H. Litz to dismiss the indictment due to preindictment delay (ECF No. 120). The parties were heard in oral argument on May 2, 2017.

The original indictment in this case was filed on April 13, 2016, against defendant Litz and co-defendant Shaun R. Hayes. Generally, it charges both with (1) bank fraud, alleging activities from 2007 to August 2009 involving Excel Bank and Centrue Bank, in violation of 18 U.S.C. §§ 1344 and 2 (Count 1); and (2) misapplication of bank funds on or about August 31, 2009, in violation of 18 U.S.C. §§ 656 and 2 (Count 2). (ECF No. 1). On January 31, 2017, the grand jury returned a superseding indictment against both defendants. It charges defendant Litz with bank fraud in Counts 1, 5, 7, and 8, in violation of 18 U.S.C. §§ 1344 and 2; conspiracy to commit bank fraud in Count 2, in violation of 18 U.S.C. § 1349; misapplication of bank funds in Counts 3, 6, and 10, in violation of 18 U.S.C. §§ 656 and 2; and making a false entry in bank books, in violation of 18 U.S.C. § 1005. (ECF No. 85). The indictments' allegations are more specifically described below.

Defendant Litz moves to dismiss the charges (referring to both the original "Indictment" (ECF No. 120 at 1) and the superseding indictment (*id.* at 2)) against him in this case for prejudicial preindictment delay. (ECF No. 120). The government opposes the motion. (ECF No. 126). At the hearing on the motion, both parties offered no evidence. Instead, they agreed that the facts set forth in the motion and in the government's response to the motion (ECF No. 126) are undisputed.

RELEVANT FACTS

From the record of this action, the undersigned considers the following relevant facts for the purposes of the motion to dismiss:

1. On May 6, 2011, the Federal Deposit Insurance Corporation (FDIC) initiated an investigation into real estate mortgage activities that developed and led to the indictments in this case.

2. In December 2011, the government served defendant Litz with a grand jury subpoena for documents of his company, Bellington Realty. That investigation involved the practices of an entity known as "Eighteen Investments," a real estate firm alleged in the original indictment to be owned by defendant Litz, regarding wrap-around mortgages. At that time there were news accounts of individuals claiming to have been defrauded by these practices.

3. In March 2014, the FDIC referred its investigation to the Department of Justice for criminal prosecution.

4. During the last quarter of CY 2014 and the first quarter of CY 2015, to facilitate moving its offices to smaller quarters, after knowing of the federal government's investigation of his and its activities, defendant Michael H. Litz's company, Bellington Realty, purged documents from his and its files. Among the documents purged were documents that relate to Excel Bank, including management records and payment records regarding transactions which are the subjects of the superseding indictment.[1]

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[1] Defendant Litz asserts that the information in the purged documents is not available to him from any other source. He also asserts that, when the documents were being purged, he did not know that these documents would be important to his defense later.

5. In March 2015, defendant Litz's company moved its offices from 225 Meramec Ave. to 222 Meramec Ave., Clayton, Missouri, which contained smaller office space.

6. In April 2016, the original indictment was filed. In three counts, it charges federal banking law offenses that allegedly occurred between June 2009 and October 2012. The grand jury found probable cause regarding criminally fraudulent activities by defendants Shaun Hayes and Michael Litz, including their involvement in co-ownership of McKnight Man I, LLC; suit being threatened by Centrue Bank against them for a $900,000 loan to their McKnight Man I; the large loan delinquencies in July 2009 owed by Eighteen Investments, a firm owned in part by defendant Litz, to financial institutions, including Centrue Bank, Excel Bank, and National City Bank; defendant Litz's involvement of an individual identified in the charges as "L.S." to sign a note for a loan from Excel Bank; Litz causing false statements to be made to Excel Bank regarding loans; and the concealment of information from the FDIC in December 2010. (ECF No. 1).

7. In January 2017, the superseding indictment against defendants Hayes and Litz was filed. This indictment realleges the three counts of the original indictment and adds allegations that they conspired between 2009 and October 2012 to commit the bank fraud alleged in Count 1 of both the original and the superseding indictments. The superseding indictment further alleges that both defendants committed specific acts of bank fraud against Excel Bank in August 2009 (Count 5), January 2010 (Count 6), June 2010 (Count 7), between July and December 2010 (Count 8), a false book entry in December 2010 (Count 9), and self-dealing during February to April 2009 (Count 10). (ECF No. 84).

8. In its investigation, the government acquired more than 50 boxes of documents from various sources, including documents involving the business activities of

defendant Litz and Bellington Realty. This material includes a separate computer hard drive containing 237 gigabytes of Excel Bank files, emails, and other information.[2]

DISCUSSION

Defendant Litz argues the case should be dismissed because of prejudicial preindictment delay. The undersigned disagrees.

The applicable statute of limitations is the primary safeguard against prejudicial preindictment delay. *United States v. Gouveia*, 467 U.S. 180, 192 (1984); *United States v. Lovasco*, 431 U.S. 783, 789 (1977); *United States v. Marion*, 404 U.S. 307, 322 (1971); *United States v. Brockman*, 183 F.3d 891, 895 (8th Cir. 1999). The earliest criminal activity alleged against defendant Litz occurred in June 2009. The original indictment and the superseding indictment were both filed well within the applicable ten-year limitations period for banking law violations provided in 18 U.S.C. § 3293.

Defendant argues he is entitled to relief under the Due Process Clause of the Fifth Amendment. For that relief, defendant must establish two elements, *i.e.* that the asserted delay was unreasonable and that he was actually and substantially prejudiced by the delay. *United States v. Hance*, 501 F.3d 900, 906 (8th Cir. 2007); *Bennett v. Lockhart*, 39 F.3d 848, 851 (8th Cir. 1994). If defendant establishes that he was actually and substantially prejudiced in his defense by the period of delay, the court considers whether defendant has shown that the delay was intended by the government to gain an advantage over the defendant, *Gouveia*, 467 U.S. at 192, and whether the government has shown that the delay was reasonable, *e.g.* it occurred for a legitimate purpose such as an investigation. *Hance*, 501 F.3d at 906; *Manning v. Bowersox*, 310 F.3d 571, 578 (8th Cir. 2002).

The cardinal facts determined by the undersigned are that (a) the original and superseding indictments allege that defendant Litz engaged in criminal activity from June

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[2] At the hearing on the motion to dismiss, government counsel indicated that these materials are available to defendant Litz for review.

2009 to October 2012; (2) the federal government initiated its investigation into this criminal activity in May 2011; (3) the government served a federal grand jury subpoena on Litz for documents of his company, Bellington Realty, in December 2011; (4) thereafter, Bellington Realty and Litz purged documents from its and Litz's files during the last quarter of CY 2014 and the first quarter of CY 2015; (5) the original grand jury indictment was filed on April 13, 2016; and (6) the superseding indictment was filed on January 31, 2017.

Defendant Litz has not established that he has been actually and substantially prejudiced as argued. There are two relevant preindictment periods of time, first, from the earliest allegedly unlawful act in June 2009 to April 2016 when the original indictment was filed, and, second, from June 2009 to January 2017 when the superseding indictment was filed. For the purposes of defendant's motion to dismiss, there is no substantial distinction between the two periods of time. This is because the time period of the grand jury's allegations in the original indictment is the same as in the superseding indictment, *i.e.* June 2009 to October 2012, and because the general subject matters of the allegations in the respective indictments are substantially the same.

For these periods of time and the events occurring during them, defendant has not described, other than generally, what information the purged documents contained. He argues they "were documents related to Excel Bank, such as management records and payment records concerning transactions at issue in the charges set forth in the Superseding Indictment []." (ECF No. 120 at 1). Much less has he described how these documents might be helpful to his defense. And he has not indicated whether the information in the purged materials can be found in the evidence the government has acquired and made available to him.

In this respect, Litz's case is a lot like that in *United States v. Jackson*, 446 F.3d 847 (8th Cir. 2006). In *Jackson*, defendant was charged with criminal activity using his computer to violate 18 U.S.C. § 2422(b). He was arrested by state authorities on August 14, 2001; his computer was seized by the FBI; he was released from custody on August

15, 2001; the state charges were dismissed in February 2002; the FBI kept custody of his computer; state authorities presented their investigation against him to the United States Attorney in November 2003; and he was charged in a federal indictment in February 2005.

Jackson argued that he was prejudiced by the preindictment delay because there was an automatic deletion of files from his computer, to which he was denied access; the memories of the investigating officers had diminished; and he suffered emotional, financial, and social discomfort during the preindictment delay. The Eighth Circuit concluded that Jackson had not shown sufficient prejudice for a due process claim. This was because he had not specified any exculpatory evidence on his computer that may have been destroyed and he had not named any witness who had forgotten an important detail during the relevant period of time. 446 F.3d at 851.

In light of the availability to defendant Litz of the documents that the government has obtained in its investigation, actual prejudice has not been shown because defendant has only summarily and speculatively argued that the information in his purged documents is not otherwise available. *United States v. Sturdy*, 207 F.3d 448, 452 (8th Cir. 2000) (ruling that defendant's speculation about how the passage of time has prejudiced him is insufficient); *United States v. Corona-Verbera*, 509 F.3d 1105, 1113 (9th Cir. 2007) (ruling that speculative argument is insufficient to establish prejudice).

Even if defendant Litz were to establish sufficient prejudice by his arguments, which the undersigned does not conclude, nothing other than the government's investigation has been shown to be the reason for the period of time from June 2009 to the filing of at least the original indictment, if not for both indictments. The length of its investigation is amply justified by the allegedly fraudulent, complex nature of the business scheme charged in the indictments. *United States v. Lovasco*, 431 U.S. at 790-95.

For these reasons,

IT IS HEREBY RECOMMENDED that the motion of defendant Michael H. Litz to dismiss the indictment (ECF No. 120) **be denied**.

The parties are advised they have 14 days in which to file written objections to this Report and Recommendation. The failure to file a timely objection may waive the right to appeal issues of fact.

/s/ David D. Noce
UNITED STATES MAGISTRATE JUDGE

Signed on May 18, 2017.